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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: LIN-02-052-53483

Office: Nebraska Service Center

Date:

FEB 10 2003

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The petitioner is a primary care healthcare business with 190 employees and a gross annual income of \$15 million. It seeks to employ the beneficiary as a primary care physician for a three-year period. The director denied the petition because the petitioner had failed to establish that extenuating circumstances prevented the beneficiary from completing his obligated 3-year period with his previous employer.

On appeal, counsel submits a brief and additional documentation.

Pursuant to 8 C.F.R. 212.7(c)(9), nonimmigrant J-1 foreign medical graduates may be granted waiver of the 2-year home country and physical presence requirement under section 212(e)(iii) of the Immigration and Nationality Act (The Act). Foreign medical graduates are eligible to apply for a waiver of the 2-year residency requirement if they meet the following conditions:

- (A) They were admitted to the United States under section 101(a)(15)(j) of the Act to pursue graduate medical education or training in the United States.
- (B) They have entered into a bona fide, full-time employment contract for 3 years to practice medicine at a health care facility located in an area or areas designated by the Secretary of Health and Human Services ("HHS-designated shortage area") as having a shortage of health care professionals.
- (C) They agree to commence employment within 90 days of receipt of the waiver under this section and agree to practice medicine for 3 years at the facility named in the waiver application and only in HHS-designated shortage areas.

8 C.F.R. 212.7(c)(9)(iv) states in pertinent part:

A foreign medical graduate who fails to meet the terms and conditions imposed on the waiver under section 214(l) of the Act and this paragraph will once again become subject to the 2-year requirement under section 212(e) of the Act.

Under section 214(l)(1)(B), however, the Service, in the

exercise of discretion, may excuse early termination of the foreign medical graduate's 3-year period of employment with the health care facility named in the waiver application due to extenuating circumstances. Extenuating circumstances may include, but are not limited to, closure of the health care facility or hardship to the alien. In determining whether to excuse such early termination of employment, the Service shall base its decision on the specific facts of each case. In all cases, the burden of establishing eligibility for a favorable exercise of discretion rests with the foreign medical graduate.

8 C.F.R. 212.7(c)(9)(v) states in pertinent part:

A foreign medical graduate who seeks to have early termination of employment excused due to extenuating circumstances shall submit documentary evidence establishing such a claim. . . . A foreign medical graduate claiming extenuating circumstances based on hardship shall also submit evidence establishing that such hardship was caused by unforeseen circumstances beyond his or her control.

The director determined that the dispute of the beneficiary's alleged unfair wage is not a matter for the Service to decide, but rather must be determined by the Department of Labor. The director further found that the Equal Employment Opportunity (EEO) Commission had not yet ruled on the beneficiary's allegations of discrimination. The director, therefore, denied the petition because the petitioner had not shown that extenuating circumstances existed that prevented the beneficiary from completing his obligated 3-year period of employment with the initial employer, Tyler Healthcare Center (THC).

In a letter dated November 30, 2001, counsel states, in part, as follows:

[The beneficiary's] early termination of the three (3) year period of employment with [THC], which is the health care facility named in the waiver application, is due to numerous extenuating circumstances which were unforeseeable and which were clearly beyond his control: (1) First, THC told [the beneficiary] that they would not renew his employment contract because they were unwilling to pay him a salary at the federally mandated prevailing wage rate; and (2) [The beneficiary] was harassed by the nursing staff at THC; and (3) [The beneficiary] gave orders to subordinates who failed to abide by his directions which led to his inability to carryout [sic] his obligations and which ultimately would have led him

to have compromised his socratic oath.

Furthermore, on appeal, counsel states, in part, as follows:

...the totality of a circumstances test would dictate that the INS should regard all of [the beneficiary's] hardships conclusively to establish that there exist extenuating circumstances beyond his control. In addition to clear Financial Hardship that will face [the beneficiary] upon his termination from THC, the Harrassment Hardship as well as the Discrimination Hardship that [the beneficiary] has been faced with, the potential violation of his Hippocratic Oath Hardship, as well as, [the beneficiary] trying to salvage his reputation as Medical Doctor Hardship due to the noncompliance of the nursing staff Hardship and various incidents posed by THC's administrators and Managers in Retaliating toward [the beneficiary] Hardship, [the beneficiary] will also be faced with trying to stay in a valid H-1B nonimmigrant status Hardship. Thus, it appears clear that there are numerous Hardships that have been, and will continue to be, thrust upon [the beneficiary] which clearly necessitate the INS to favorably exercise its discretion and permit [the beneficiary] to continue his services at MCHS.

The record shows that the Service sent notification of its approval of the H-1B visa petition filed on behalf of the beneficiary by THC on March 6, 2000. The approval of the petition was valid from March 3, 2000 to October 30, 2002.

On December 3, 2001, the current petitioner, Morton County Health System, filed an H-1B petition on the beneficiary's behalf. The record contains a letter dated January 17, 2002, from the CEO/Administrator of THC, who states that the beneficiary's contract would be terminated on June 30, 2002. The record contains copies of the beneficiary's complaints filed with the Equal Employment Opportunity Commission and the U.S. Department of Justice, Office of Special Counsel for Immigration Related Unfair Employment Practices.

The beneficiary clearly did not complete his contracted 3-year period of employment with THC as required by the regulation at 8 C.F.R. 212.7(c)(9)(iv). The question to be determined in this proceeding is whether extenuating circumstances existed that prevented the beneficiary from completing his contracted 3-year period of employment for THC.

The petitioner has provided the following documents relating to the beneficiary's contracted employment with THC:

1. Copy of a U.S. Department of Labor, Wage and Hour Division of the State of Minnesota complaint: THC has not been paying [the beneficiary] a salary at the federally mandated prevailing wage rate;
2. The LCA filed by THC on the beneficiary's behalf;
3. Copy of THC's contract, which shows [the beneficiary's] annual salary;
4. Copy of the complaint to the Equal Employment Opportunity Commission filed by the beneficiary;
5. Copy of the complaint to the U.S. Department of Justice, Office of Special Counsel for Immigration Related Unfair Employment Practices, filed by the beneficiary;
6. Notarized letter from Joan C. DeVries, R.N. who describes, in part, the noncompliance of the nursing staff at THC, causing hardship to [the beneficiary];
7. Notarized affidavit from Rolando M. Bueno, M.D., who describes, in part, the noncompliance of the nursing staff at THC, causing hardship to [the beneficiary].

Counsel asserts that the totality of the circumstances, which includes not only the financial hardship, but also the hardship encountered by the beneficiary in effectively carrying out his duties at THC, rise to the level of extenuating circumstances and severe hardship. Evidence in the record shows, in part, that the beneficiary's contract with THC will not be renewed, and that the beneficiary has pending complaints of a hostile and prejudicial work environment filed with the Equal Opportunity Commission and the U.S. Department of Justice, Office of Special Counsel for Immigration Related Unfair Employment practices. In view of the foregoing, it is concluded that the petitioner has submitted sufficient evidence to show that extenuating circumstances prevented the beneficiary from completing his contracted three-year period of employment with THC.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has sustained that burden.

ORDER: The appeal is sustained.